No. 14080.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WONG KEN FOON, as Guardian *Ad Litem* for WONG HING GOON,

Appellant,

vs.

HERBERT BROWNELL, JR., Attorney General of the United States,

Appellee.

BRIEF FOR APPELLANT.

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Jurisdictional Statement.

The plaintiff-appellant herein commenced the proceedings in the lower court under the provisions of Section 1993, Revised Statutes of the United States (Acts of April 14, 1802, and February 10, 1855, before amended by Act of May 24, 1934, Sec. 1, 8 U. S. C. A. 601(g)). (This Act has since been amended in 1952, but was the law applicable at the time plaintiff was born.) Such Act in as far as applicable to plaintiff reads as follows:

> "All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of

the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States."

Jurisdiction is conferred upon the court below by the Act of October 14, 1940, Ch. 876, Title I, subchapter 5, section 503, 54 Stat. 1171 (8 U. S. C. A., Sec. 903). This section in as far as it is applicable to plaintiff provides as follows:

> "If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the District Court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a National of the United States. * * *."

This statute was repealed in 1952, but was the pertinent jurisdictional law in effect at the time plaintiff's complaint was filed herein.

Statement of the Case.

Plaintiff, Wong Hing Goon, by and through his guardian *ad litem,* Wong Ken Foon, filed in the United States District Court for the Southern District of California, Central Division, a petition seeking a Declaratory Judg-

ment of United States citizenship. The action was brought pursuant to the Statute then in effect, to-wit: Section 503 of the Nationality Act of 1940 (8 U. S. C. A. 903). The appellant claims to have acquired United States citizenship at the time of his birth, in accordance with the United States Nationality Statute then in effect. The appellant, Wong Hing Goon, claims to be the lawful blood child of Wong Ken Foon. It was conceded by the defendant-appellee in the pleadings in paragraph II of their Answer [Tr. 8] and in the findings of the Court in paragraph III [Tr. 13], that Wong Ken Foon, the alleged father of the appellant herein, was admitted to the United States from China as the son of a native and on or about January 3, 1921, and was issued Certificate of Identity No. 32494 by the Immigration and Naturalization Service at San Francisco, California.

It was further conceded in the pleadings that Wong Ken Foon has been a permanent resident of the United States since November 26, 1920, when he first arrived in the United States on *S.S. Tjikemsang,* and that said Wong Ken Foon has made two trips from the United States to China. On the first trip he departed from San Francisco, California, September 27, 1926, via *S.S. President Taft,* and returned to San Francisco on October 5, 1927, via *S.S. President Grant.* On his second trip he departed from Los Angeles, California, July 10, 1932, via *S.S. President McKinley,* and returned to Los Angeles, California, August 21, 1933, via *S.S. President Grant.* [Tr. 4 and 8.]

The plaintiff herein arrived from China via airplane to the City of Los Angeles, California, seeking admission as the son of Wong Ken Foon. It was stipulated at the time of trial in the lower court that the American Consul in China had issued travel papers to the appellant without raising any objections, and the first objections were made when he arrived in the United States. [T. 33.] Upon the arrival of appellant on or about January 18, 1952, he was held by the Immigration and Naturalization Service pending a determination of his status. On February 15, 1952, a hearing was held before the Board of Special Inquiry of the Immigration and Naturalization Service at San Pedro, California. The Board of Special Inquiry denied appellant's application for admission and recognition as a United States citizen. The appellate administrative authority, the Board of Immigration Appeals, affirmed the decision excluding the appellant from the United States. Thereafter appellant, through his guardian *ad litem,* Wong Ken Foon, filed the judicial proceedings to have his claim of citizenship determined by the lower court.

The cause came to trial below without a jury. The appellant, his father, Wong Ken Foon, and two disinterested witnesses testified concerning the claimed relationship of appellant to his father Wong Ken Foon. The defendant-appellee presented no witnesses. The defense introduced as Exhibit "A" certain immigration records and transcript of proceedings before the Board of Special Inquiry, and other proceedings, which incorporated ques-

tions and answers of a preliminary hearing in January of 1952, and with reference to the Application of the Appellant for Admission before the Immigration Service. The lower court found for the defendant and it is from this judgment that the appellant prosecutes this appeal.

Statement of Points.

I.

The trial court erred in allowing in evidence the transcript of the immigration hearing in February, 1952, which said transcript incorporated questions and answers of a preliminary hearing in January, 1952.

II.

The Court erred in indulging in conjecture in relation to the conduct of plaintiff, Wong Hing Goon, with regard to his habits of play and associations in his native village in China, rather than indicating evidence as actually adduced.

III.

The Court erred and abused its discretion in not permitting a continuance of the trial for the taking of the testimony of the mother of plaintiff.

IV.

The Court erred in not declaring the plaintiff, Wong Hing Goon, a citizen of the United States, in view of the lack and failure of any evidence to the contrary adduced or introduced by the defendant.

Argument.

It now appears to have been clearly established that an action brought under Section 503 of the Nationality Act (8 U. S. C. A. 903) is an independent action and shall not be deemed to be review of any administrative board or hearing, and specifically would not be deemed a review of the proceedings before the Board of Special Inquiry, nor any preliminary hearing had in such proceedings, nor the proceedings before the Board of Immigration Appeals.

> *Lee Mon Hong v. McGranery* (D. C. Cal., 1953), 110 Fed. Supp. 682;
>
> *Wong Wing Foo v. McGrath* (C. A. Cal., 1952), 196 F. 2d 120 (Opinion by Chief Judge Denman of this court).

It is respectfully submitted that as the proceedings before the lower court were therefore in the nature of an independent proceeding, the trial court improperly admitted into evidence any proceedings before the Immigration and Naturalization Service, as it was an administrative board and the trial court should only have considered the testimony of the actual witnesses before it.

During the course of the trial below frequent reference was made to the transcript of a hearing before the Board of Special Inquiry in San Pedro on February 15, 1952, by the United States attorney. It is readily apparent that the defendant-appellee was basing its main defense upon the use of the transcript before this administrative board, and it would seem that this contention of the defendant influenced the Court in its decision. A rather extensive discussion between the trial court and the United States Attorney with reference to the transcript of the adminis-

trative hearing commences at page 62 of the Transcript of Record and continues for several pages. To substantiate appellant's contention that the United States Attorney was relying primarily upon this transcript of the administrative proceedings and that this influenced the Court, we find the following language:

> "The Court: In other words, your whole case or your theory was that he was not familiar with the village, is that correct?" [Tr. 64.]

The conversation between the Court and the United States Attorney continues on pages 65 and 66 of the Transcript of Record. From an examination of the record it appears that the Transcript referred to by the United States Attorney of the hearing before the Board of Special Inquiry on February 15, 1952, also included a preliminary hearing in January of 1952. No foundation was laid as to the type of hearing had in the preliminary hearing of January, 1952, nor anything other than counsel's statement as to the manner in which the hearing was conducted on February 15, 1952. The Transcript of the administrative proceedings was used throughout by the United States Attorney and occasionally by the Court. [Tr. 120.] The Transcript of the administrative proceedings was originally referred to as Defendant's Exhibit "A," for identification, and was ultimately admitted into evidence by the Court as Defendant's Exhibit "A." [Tr. 102.]

It is conceded by appellant that under certain circumstances books or records of account and records made in the regular course of business, which are properly certified official records, may be admitted in evidence for limited purposes under the provisions of 28 U. S. C., Section 1733, and 28 U. S. C., Section 1732. These sec-

tions are limited to the records of any department or agency of the United States or the records of any court of the United States made in the regular course of business. In an Opinion of this Court, rendered by Chief Judge Denman, in the case of *Wong Wing Foo v. McGrath* (1952), 196 F. 2d 120, the Court discussed this matter at length and distinguished Sections 1732 and 1733 of 28 U. S. C., as not being exceptions to the hearsay rule allowing the testimony of proceedings before an administrative board. In that case the Court specifically held that the trial court improperly considered the testimony before the Board of Special Inquiry. In discussing the admissibility of a transcript of the proceedings before the administrative board, this Court stated:

> "Hence his testimony before the Board of Special Inquiry, though between the same parties and on the same issue, is not admissible as the exception to the hearsay rule where such a witness is dead or otherwise not available."

In distinguishing Sections 1732 and 1733, 28 U. S. C., this Court further stated:

> "We cannot believe that either of these two cited sections were intended to abolish the rule considered *supra* which permits such use of testimony of a witness in another and different proceeding between the same parties and on the same cause of action only when that witness is shown to be dead or otherwise not available."

It is readily apparent in the instant case that the witnesses were not only available but were actually present in court during the trial of the action. Therefore, as they were not "shown to be dead or otherwise not available," the Court should not have admitted Defendant's Exhibit "A"

for identification, being a transcript of the administrative proceedings.

In furtherance of the contention of appellant that the transcript of the administrative proceedings was inadmissible in the trial below, Volume 20, American Jurisprudence, Section 686, at pages 578 and 579, states as follows:

> "The mere fact that testimony has been given in the course of a former proceeding between the parties to a case on trial is no ground for its admission in evidence. The witness himself, if available, must be produced the same as if he were testifying *de novo.* His testimony given at a former trial is mere hearsay. This rule applies to testimony given by all witnesses at the former trial whether they were expert or lay witnesses."

See also:

United States v. International Harvester Co., 274 U. S. 693, 47 S. Ct. 748, 71 L. Ed. 1302;

E. E. Yarbrough Turpentine Co. v. Taylor, 201 Ala. 434, 78 So. 812, citing R. C. L.;

Savannah, F. & W. R. Co. v. Flannagan, 82 Ga. 579, 9 S. E. 471, 14 Am. St. Rep. 183;

St. Joseph v. Union R. Co., 116 Mo. 636, 88 S. W. 794, 38 Am. St. Rep. 626;

New York C. R. Co. v. Stevens, 126 Ohio St. 395, 185 N. W. 542, 87 A. L. R. 884;

Madden v. Duluth & I. R. R. Co., 112 Minn. 303, 127 N. W. 1052, 21 Ann. Cas. 805.

In the *Application of Murra,* 166 F. 2d 605, a Petition for Naturalization was heard in open Court where the

witnesses were examined for the Court. The Court stated:

> "* * * the hearing before the court is not for the purpose of reviewing the recommendations of the Examiner; it is a hearing *de novo* and it is obvious that the court must decide the issues upon the testimony which it hears, and that neither the testimony heard by the examiner, his findings, nor his recommendation are of any consequence."

Likewise, this Court in *Lee Choy v. United States,* 49 F. 2d 24 at page 27, concluded that improper introduction of certain immigration records was reversible error. The Court stated:

> "It thus appears that the Court unconsciously allowed the erroneously admitted record to influence him in consideration of the case. This is a striking illustration of the danger of getting into the record evidence not admissible under well-recognized rules. If these records were controlling in the decision of the case, it would seem that the defendant should be discharged from custody. In Judicial proceedings the court is restricted in the reception of evidence to only such as meets the requirements of legal proof."

It is therefore respectfully submitted that the evil of permitting a transcript of proceedings before the Special Board of Inquiry and other administrative proceedings is that the Court will undoubtedly consider the statements and representations of the witnesses without having an opportunity to hear their actual testimony, or observe their demeanor, or determine properly the authenticity of their statements. It is also obvious that counsel do not have the right of cross-examination or direct examination in

such a proceeding, as in many cases an attorney is not even allowed or permitted for the applicant. In the proceedings before the lower Court, the Court should have only considered the actual testimony of the witnesses and not permitted itself to be swayed by the proceedings before the administrative board. It is, therefore, urged that the trial judge committed prejudicial error in admitting the entire immigration record as evidence.

During the course of the trial below, the United States attorney indulged in extensive cross-examination of the plaintiff with reference to his playmates in his home village in China and the physical location of the houses and alleys and neighbors in the home village. Again he made extensive reference to the transcript before the administrative board. Apparently he was laying great stress upon alleged lack of knowledge of the plaintiff of his playmates and neighbors, which position he stated at length to the Court. [Tr. 65.] It appears that the trial Court placed great reliance upon this fact in questions asked by the Court. [Tr. 71, 72, 73.] The Court further inquired of plaintiff concerning the background in the village and with reference to the transcript of the administrative proceedings, which appeared to confuse the witness. [Tr. 90 through 95.] It appears that the Court was indulging in conjecture with reference to the habits of the plaintiff, rather than listening to his direct testimony. At one point the Court stated:

> "The Court: Well, this question here says he didn't know the name of anybody in the village and, not only that, but he said it two or three times. He emphasized it. It is inconceivable how a youngster could live in a village of 40 or 50 houses for 20 years and then say he doesn't know anybody that lived in

> the village. If it was an American youngster, he would be in every one of the houses and probably could tell you more about the life history of the people than they could themselves." [Tr. 92.]

This appears again to be an example of the evil of permitting the use of the transcript of the administrative proceedings, rather than the Court observing the demeanor of the witness and listening to his actual testimony. Finally at the conclusion of the trial, the Court commented at length on the fact that plaintiff did not appear to know the names of the people in the village nor his playmates. [Tr. 140.]

It is therefore submitted that the trial Court committed prejudicial error in indulging in conjecture concerning the playmates and knowledge the plaintiff had of his own village, and by referring to testimony and statements in Defendant's Exhibit "A," being the transcript of the administrative proceedings.

At the conclusion of the trial, Bernard C. Brennan, attorney for plaintiff, requested a brief continuance for the purpose of bringing the mother of plaintiff to the United States to testify, and stated he had already undertaken proceedings to bring her to this country. [Tr. 139.] Mr. Brennan set forth his reasons for the motion to clear up an apparent discrepancy with reference to the residence of a person in China. [Tr. 142 and 145.]

As the Court apparently was relying so heavily on the transcript of the administrative proceedings with reference to the background of plaintiff, it is respectfully submitted that the Court abused its discretion in not permitting a brief continuance to hear the testimony of the mother of plaintiff as to the background of the village

and the physical facts that could be adduced by her testimony. This was the primary reason for her testimony and not as the Court stated that she would merely testify that plaintiff was her son. [Tr. 140.]

Appellant contends that he is a citizen and national of the United States. Statutes of the United States in effect at the time of the birth of this appellant specifically provided that the foreign born child of a Unied States citizen acquired Unitied States citizenship at birth. As this Court has previously stated, *Jung You v. Nagle,* 34 F. 2d 848, 851:

> "* * * Question in the case of applicants who claim citizenship by reason of sons or daughters of an American citizen is the question of paternity."

Thus, once the relationship of the appellant to the said Wong Ken Foon, his alleged father, a recognized United States citizen, has been established by evidence of record, the appellant must be deemed to have acquired United States citizenship in accordance with the provisions of that statute. The claim to United States citizenship having been established, the appellant is entitled to a declaratory judgment of United States nationality.

Acheson v. Yee King Gee, 184 F. 2d 382;

Wong Gan Chee v. Atcheson, 95 Fed. Supp. 816;

Toy Teung Kwong v. Acheson, 95 Fed. Supp. 745.

The sole issue, therefore, is whether the applicant, or appellant herein, is the son of a United Stats citizen. See *Quan Toon Jung v. Bonham,* 119 F. 2d 915, 916. Relationship is the sole issue. *Yep Suey Wing v. Berkshire,* 73 F. 2d 745, 746.

The appellant as plaintiff in the court below had the burden of proof as to the affirmative issues raised by the pleadings. Since the appellee concedes the United States citizenship of Wong Ken Foon, the only issue before the court was the relationship of Wong Hing Goon to the said Wong Ken Foon. See *Tillinghast v. Flynn,* 38 F. 2d 5; *Dong Rh Lon v. Proctor,* 110 F. 2d 808, 809.

It is not necessary that the appellant's evidence be uncontradicted, nor that the evidence most favorable to his contention carry conviction beyond a reasonable doubt. The *quantum* of evidence, in whose favor it preponderates, shall be determinative as to whether the evidence sustains the burden of proof.

See:

Lilienthal's Tobacco v. United States, 97 U. S. 237, 24 L. Ed. 901, 905.

If the party having the burden of proof establishes a *prima facie* case, the burden of evidence is shifted to the adverse party. (31 C. J. S. 719.) Did this plaintiff-appellant establish a *prima facie* case?

Wong Ken Foon, the alleged father of plaintiff herein, testified in the court below that he married Ng Shee (referred to as Eng Shee in the petition) September 28, 1926, in Nam On Village where he was born. [Tr. 27.] He further testified that plaintiff was born June 24, 1927, in Nam On Village. [Tr. 28.] He identified plaintiff herein, who was in the court room, as the boy that was born on said date. [Tr. 28.] He further testified that when he returned to China he again saw his son, plaintiff herein, who was living in the family home in the same village as when he left China previously. [Tr. 29-30.] In corroboration of his testimony he stated he reported

the birth of his son, Wong Hing Goon, plaintiff herein, to the immigration authorities. [Tr. 31.] He also testified concerning his second trip where he reported he had two children, again mentioning plaintiff herein. [Tr. 31-32.] The alleged father, Wong Ken Foon, further testified that he recognized the plaintiff herein from a photograph sent by his wife from China. [Tr. 35-36.]

The plaintiff, Wong Hing Goon, testified that he was born in Nam On Village in Hoy Shan district and Kwangtung Province, June 24, 1927. [Tr. 39.] He testified that when he arrived in Los Angeles, California, from China he met Wong Ken Foon and recognized him as the person he had seen in the village and as his father. [Tr. 41.] He further testified that he lived in the home village with his mother and younger brother, and that his mother had identified Wong Ken Foon as his father when he was in the village on the last occasion the father visited the family. He identified a woman from a photograph previously identified as the wife of Wong Ken Foon as his mother. [Tr. 42-43.] He further testified that he recognized the man in the picture as Wong Ken Foon, the alleged father herein [Tr. 43], and that he also recognized him at the airport when he arrived at Los Angeles, California, from China. He further testified that he recognized this man as his father from the time he was six or seven years of age, and that his mother's name was Ng Shee. [Tr. 44.] He further identified another photograph as including himself, his mother and his younger brother [Tr. 47], and that the woman shown in both photographs, namely, Plaintiff's Exhibits 3 and 4, was his mother in each case. [Tr. 48.]

Russell K. Fong, testifying on behalf of plaintiff, stated he was a public accountant. [Tr. 105.] He stated

he was the accountant for the employer of Wong Ken Foon and brought certain records with him to court relating to withholding tax deductions for Wong Ken Foon, and after identifying the Social Security number, he testified that under the heading of dependents Wong Ken Foon had listed four. [Tr. 106.] He further stated that on the records of the employer, four dependents were shown from 1943 through 1949. [Tr. 109.] His testimony would corroborate the testimony earlier of Wong Ken Foon, that by listing four dependents it included himself, his wife, and his two children born in China.

Wong Wing Yen, testifying on behalf of appellant, stated he knew appellant Wong Hing Goon, who was identified as sitting at the counsel table in the court below [Tr. 133], and that he had seen him in China in 1946 in his home village of Nam On. [Tr. 134.] He further testified that he knew Wong Ken Foon and that when the witness went to China Wong Ken Foon asked him to do him a favor by giving money to his wife and some fountain pens to the children. [Tr. 134.] He further testified that when he arrived in the home village he inquired of the villagers where "Wong Hing Goon's family" lived, and that the villagers pointed out the family home to him. [Tr. 135.] He identified from a photograph [Pltf. Ex. 4] the woman as the mother of appellant herein and identified appellant as the boy sitting at the counsel table during the trial. [Tr. 136.] We thus have positive identification by an independent witness not related to the alleged father or the plaintiff herein.

It might be observed that although plaintiff had the burden of proof in the suit below, this type of burden does not raise a presumption that the plaintiff or his witnesses will commit perjury.

> *Lee Mon Hong v. McGranery* (1953), 110 Fed. Supp. 682.

The testimony above set forth of the appellant and his father clearly expresses a father and son relationship. It was stated by Judge Wilbur in the case of *Gung You v. Nagle,* 34 F. 2d 848 at page 852:

> "Relationship is now usually proven by physical facts, and never is where the mother does not testify, but by pedigree, reputation in the family and by the conduct of the parties, including the manner in which they live. The fact that a small child lives in the home of its alleged parents and that they maintain toward each other the obligation involved in the relationship is evidence favorable to the issue, and evidence that they did not live together and did not conduct themselves as parent and child is evidence to the contrary. Such evidence is not collateral evidence, it is direct and material evidence on the issue."

The testimony of the appellant and his father standing alone would be sufficient to establish a *prima facie* showing of the claimed relationship. This pedigree evidence, if uncontradicted by other evidence, is sufficient to sustain the issue it covers. Such testimony is entitled to consideration in arriving at a decision in this matter. This Court has previously stated:

> "He took the stand and testified to his own belief concerning his place of birth. This evidence of

course, was hearsay, but nevertheless, it is the type of hearsay which is permitted. U. S. v. Wong Gong (C. C. A.), 70 F. 2d 107."

Lee Hin v. United States, 74 F. 2d 172, 173.

Also see:

Ex parte Delaney, 72 Fed. Supp. 312, aff. 170 F. 2d 239.

The same view was expressed by this Court in *United States v. Wong Gong,* 70 F. 2d 107:

"The testimony of the wtiness as to the date and place of his birth is, of course, hearsay, but it is competent. *Wignore on Evidence,* p. 1501; *United States v. Tod* (C. C. A.), 296 F. 345."

The Court of Appeals for the First Circuit stated that in the absence of official records, statements of the parents concerning their children should be considered as reliable.

O'Connell v. Ward, 126 F. 2d 615, 620.

The evidence offered by appellant to establish his claim to United States citizenship cannot be wholly disregarded without sufficient reasons.

See:

Wong Kam Chong v. United States, 111 F. 2d 707, 712;

Lau Hu Yuen v. United States (9 Cir.), 85 F. 2d 327.

Likewise, any slight discrepancy should be disregarded.

See:

Young Lee Gee v. Nagle, 53 F. 2d 448;

Jung Yen Loy v. Cahill, 81 F. 2d 809, 813.

It was stated by the Court of Appeals for the First Circuit in *Ward v. Flynn,* 74 F. 2d 145 at page 146:

> "* * * to reject sworn, consistent, unimpeached and uncontradicted testimony, there must be a real reason which would be regarded as adequate by fair minded persons."

The appellant identified himself by direct and positive evidence as the lawful son of a recognized United States citizen. The lawful son of a recognized United States citizen is legally entitled to a declaratory judgment of United States citizenship. (8 U. S. C. A. 903.) It is submitted that the decision of the lower court was in error.

Conclusion.

It is respectfully submitted that the proceedings in the lower court was an independent trial in the matters framed by the pleadings and was not a review of the administrative hearing. As a consequence, the Court erred in admitting into evidence the transcripts and proceedings before the administrative board and permitting itself to be influenced thereby, and that the admission of such administrative proceedings was prejudicial error. Defendant's Exhibit "A" was inadmissible and incompetent evidence and should have been excluded. In conjunction with this Exhibit "A" of the defendant-appellee, the Court should not have indulged in conjecture with reference to the playmates and physical surroundings of plaintiff in his home village, and committed prejudicial error and abuse of discretion thereby.

Appellant established his claim to United States citizenship by a fair preponderance of evidence and no testimony was introduced on behalf of defendant-appellee. It is, therefore, respectfully requested that the judgment of the lower court be reversed, and that appellant be declared a United States citizen and/or national.

Dated: January 11, Los Angeles, California.

Respectfully submitted,

BRENNAN & CORNELL,

By WM. E. CORNELL,

Attorney for Appellant.